80-556

No. .....

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1980

Central Liquor Company, et al.,

Petitioners,

VERSUS

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October, 1980

QUESTIONS PRESENTED

The questions presented here raise important issues concerning the proper interpretation of the Double Jeopardy Clause and the procedural remedy created by *Abney* v. *United States*, 431 U.S. 651 (1977), to which this Court has not spoken and upon which the Courts of Appeals are in conflict. The Court of Appeals below dismissed these Double Jeopardy Clause appeals for want of jurisdiction, limiting *Abney* to its facts, *despite* the fact that jeopardy had attached to all petitioners. The substantive Double Jeopardy Clause question presented here is one of large importance. The District Court had held interlocutory appeals *were* proper under *Abney*. The Court of Appeals, nevertheless, dismissed them.

Thus, the questions presented are:

1. Whether the Court of Appeals had the power to dismiss these Double Jeopardy Clause appeals, for want of jurisdiction, despite this Court's decision in *Abney* v. *United States*, 431 U.S. 651 (1977)? These appeals were taken after the District Court had denied motions to dismiss the indictment, and *after jeopardy had admittedly attached to all Petitioners.*

2. Whether the Court of Appeals had the power to enter a jurisdictional dismissal of these Double Jeopardy Clause appeals, notwithstanding the fact that the jury had been empaneled, in light of this Court's repeated holdings that the protection of the Double Jeopardy Clause attaches as soon as the jury is sworn, a rule which "serves as the lynchpin for *all* double jeopardy jurisprudence." *Crist* v. *Bretz*, 437 U.S. 28, 34 (1978) (emphasis added). The holding below is in conflict with *Crist;* with the controlling

law in the Second Circuit, *United States* v. *Alessi*, 536 F.2d 978, 979-981 (2d Cir. 1976), and conflicts in principle with the controlling law in the Ninth Circuit, *see, Launius* v. *United States*, 575 F.2d 770, 771 (9th Cir. 1978) *and, United States* v. *Griffin*, 617 F.2d 1342, 1343-1346 (9th Cir. 1980).

The conflict between the Second, Ninth and Tenth Circuits as to when a pretrial appeal is permissible under *Abney and Alessi* is made even more explicit by *United States* v. *Eggert*, No. 80-1244, ___ F.2d ___, ___ (10th Cir., July 24, 1980), not yet officially reported, Slip Op. pp. 3-5, in which the Court of Appeals expressly declined to follow *Alessi*, and, by implication, *Griffin*. And the conflict between the jurisdictional dismissal below and the rule of *Crist, supra,* is apparent.

3. Whether the course of decisions in the Court of Appeals for the Tenth Circuit regarding interlocutory appeals in criminal cases under the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U.S. 541, 545-547 (1949) and *Abney* v. *United States, supra,* exemplified by the jurisdictional dismissal of which review is here sought, the previous dismissal of appeals in these cases, *United States* v. *Abraham, et al.*, Nos. 79-1017 and 79-1018 (10th Cir. 1979), *cert. denied,* ___ U.S. ___, 100 S.Ct. 137 (1979); *Rumpf* v. *United States*, 576 F.2d 818, 821-823; *cf. id.*, at 826-827 (McKay, J., dissenting) (10th Cir. 1978) *cert. denied*, 439 U.S. 893 (1978); and *United States* v. *Eggert*, No. 80-1244, ___ F.2d ___ (10th Cir. 1980), as well as the conflict between these decisions and those in other Circuits demonstrates a need for review by this Court in order to clarify the proper scope of the *procedural* holding of

Abney and the *substantive* holdings of *Crist* and *Menna* v. *New York*, 423 U.S. 61, 62, n.2 (1975)?

4. Whether a felony indictment brought under 15 U.S.C. §1 charging a double-felony against *both* two small three-person general partnerships, one of them (Central Liquor Company) a *family* partnership, consisting of mother, father and son, *and* a partner therein, for identical alleged acts, violates the Double Jeopardy Clause as construed by this Court in, *e.g.*, *Whalen* v. *United States*, ___ U.S. ___, 100 S.Ct. 1432, 1436-1440 (1980); *Brown* v. *Ohio*, 423 U.S. 161, 165-166 (1978); *Sanabaria* v. *United States*, 437 U.S. 54, 69-70 (1977); *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969); and, therefore, constitutes a "*charge* . . . which the [government] *may not* constitutionally *prosecute*." *Menna* v. *New York*, 423 U.S. 61, 62 and n.2 (1975) (emphasis added).

This important double jeopardy question has never been considered here, and the only Court of Appeals to rule upon it divided 2 - 1. *Western Laundry and Linen Rental Company* v. *United States*, 424 F.2d 441 (9th Cir. 1970), *cf*, *id.*, at 424 F.2d, 445 (Hufstedler, J., dissenting and specially concurring in the judgment only).*

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* The following is a list of all parties involved in these cases: Central Liquor Company, a partnership composed of Zeak T. Naifeh, Rose Naifeh and Robert Z. Naifeh; Robert Z. Naifeh, a partner therein; Jarboe Sales Company, a partnership composed of Joe Jarboe, Mark Carson and Louis Abraham, Jr.; and Louis Abraham, Jr., a partner therein.

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No. ———

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT Z. NAIFEH, LOUIS ABRAHAM, JR., CENTRAL LIQUOR COMPANY and JARBOE SALES COMPANY,
Petitioners,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals, not yet officially published, the unreported order of the District Court staying proceedings pending consideration of this petition for a writ of certiorari, the previous unreported opinions of the District Court (Thompson, J.), the opinion of the Court of Appeals on the first appeal in this case (which also resulted in a jurisdictional dismissal) and the unreported opinion of the District Court from which the first appeal was taken (Eubanks, J.), are reprinted as Appendix A, hereto.

JURISDICTION

This Court's jurisdiction is invoked to determine whether the Court's decision in *Abney* v. *United States*, 431 U.S. 651 (1977), is limited only to "sequential" double jeopardy cases, arising after one trial has been suffered, or whether the rule of *Abney* encompases review of the denial of a motion to dismiss an indictment which shows on its face that it is vitiated by the Double Jeopardy Clause, so long as the denial was entered *after* the jury was sworn and jeopardy had attached. *See, Crist* v. *Bretz*, 437 U.S. 28, 31-34 (1978), and *compare*, the decision below with the conflicting holdings in *United States* v. *Alessi*, 536 F.2d 978, 979-981 (2d Cir. 1976); and, in principle, *United States* v. *Griffin*, 617 F.2d 1342, 1344-1346 (9th Cir. 1980), and *Launius* v. *United States*, 575 F.2d 770, 771 (9th Cir. 1978).

The judgment and mandate of the Court of Appeals were entered on August 11, 1980. This petition for certiorari was filed within sixty (60) days of that date. The Court's jurisdiction rests upon 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES OF PROCEDURE INVOLVED

The Double Jeopardy Clause of the Fifth Amendment, 28 U.S.C. §1291, Rules 12(b) and 12(f) of the Federal Rules of Criminal Procedure and Rule 4(b) of the Federal Rules of Appellate Procedure appear as Appendix B to this Petition.

STATEMENT

This case presents unresolved questions involving both the substantive protection of the Double Jeopardy Clause, and the procedural means for vindicating an infringement of the rights so guaranteed.

The questions arise against the background of a truly extraordinary indictment.

On December 7, 1978, a felony indictment was returned charging Central Liquor Company, a family partnership of mother, father and son; Robert Z. Naifeh, one of the family member-partners therein (the son) together with one other three-person partnership and one of the partners therein, with conspiracy to set and maintain the prices of alcoholic beverages within the State of Oklahoma in violation of 15 U.S.C. §1. Petitioners promptly moved to dismiss the indictment on the ground that it was apparent on the face thereof that an indictment of *both* two small partnerships, one of them a small *family* partnership *and* one of the member-partners in each for identical alleged acts, was barred by the Double Jeopardy Clause, and, as this Court held in *Menna* v. *New York*, 423 U.S. 61, 62, n.2, if the Double Jeopardy Clause necessarily stood in the way of conviction, "the *charge* is one which the [government] *may not* constitutionally *prosecute*." (emphasis added).

The District Court (Eubanks, J.), agreed with petitioners' Double Jeopardy Clause contention, as a matter of principle. The court stated that, as an original question, counsel for petitioners would have "*no difficulty* persuading me that *we have double jeopardy here*." (Tr. of Hearing,

January 4, 1979, p.19, ln.22 through p.20, ln.1); (emphasis added).

The District Court, however, noted the existence of an apparently inconsistent opinion from a divided panel of the Court of Appeals for the Ninth Circuit, *Western Laundry and Linen Rental Company* v. *United States*, 424 F.2d 441 (9th Cir. 1970), *cert. denied*, 400 U.S. 849; *cf, id.*, at 444-445 (Hufstedler, J., dissenting and concurring specially in the judgment only) and, out of respect for what Judge Eubanks described as the "hierarchy" within the federal judicial system, deferred to the prevailing opinion in *Western Laundry* and declined to dismiss the indictment, explicitly noting that this ruling was immediately appealable. *See*, Appendix A, p. 20. The government did not question the District Court's holding regarding the immediate appealability of its order under *Abney* v. *United States, supra.*

Petitioners immediately appealed to the Court of Appeals. The Double Jeopardy Clause question was elaborately briefed on its merits. On the first appeal, the government injected into the appeals a question of jurisdiction. The government suggested that *Abney* was limited to its precise facts.

The Court of Appeals *did not* accept the government's theory on the *first* appeal. Rather, the court, *sua sponte*, observed that this Court had held in *Serfass* v. *United States*, 420 U.S. 377, 392-394 (1975), that the Double Jeopardy Clause did not bar a *government* appeal prior to the attachment of jeopardy and, the court held, it must follow that *Serfass* also barred an appeal by a defendant under 28 U.S.C. §1291, at least prior to the time jeopardy had

"attached". Appendix A, p. 16. The court stayed its mandate pending final disposition of certiorari by this Court. Appendix A, p. 18. Ultimately, this Court denied petitions for writs of certiorari. *Naifeh* v. *United States*, ___ U.S. ___, 100 S.Ct. 137 (1979); *Abraham* v. *United States*, ___ U.S. ___, 100 S.Ct. 137 (1979).

The cases returned to the District Court. The motions to dismiss on double jeopardy grounds were renewed. The District Court (Thompson, J.) reasoned, App. A, p. 14, that the motions must be denied as "unripe", in light of the Court of Appeals opinion, until such time as the jury was empaneled and sworn. After the jury was sworn, the motions to dismiss on double jeopardy grounds were renewed at the bench. (Tr., November 21, 1979, p.90, ln.10-18; p.91, ln.9-13; p.92, ln.1 through p.94, ln.4.)

The District Court held the motions were now "ripe" since jeopardy had attached to petitioners through the empanelment of the jury. On the merits, the District Court overruled the motions to dismiss solely on the authority of *Western Laundry, supra.* App. A, pp. 13, 14. The District Court (Thompson, J.) *again* held that the order overruling the motions to dismiss on double jeopardy grounds *was* immediately appealable to the Court of Appeals under this Court's decision in *Abney*, and expressly noted the government's contrary argument was unsupported by *any* authority. *Id.*, pp. 11, 12.

Once again, appeals were taken. On the second appeal, now before this Court, both the question of appealability and the merits of the Double Jeopardy Clause violation were thoroughly briefed.

On August 11, 1980, a differently constituted panel of the Court of Appeals,[1] again dismissed the appeals for want of jurisdiction.

The second opinion of the Court of Appeals, now presented for review, states that *Abney* allowed a pretrial appeal only because the defendants in that "particular" case were seeking to appeal an order to prevent a *second* trial. The opinion flatly holds that the instant Double Jeopardy Clause question is not immediately appealable under *Abney despite the fact that jeopardy has attached to all petitioners.*

The opinion also holds that all petitioners must suffer trial before they can receive appellate review of the important double jeopardy question here presented. There is no mention in the opinion of this Court's decisions in *Crist* v. *Bretz, supra,* and *Menna* v. *New York, supra,* nor of the Second Circuit's holding in *United States* v. *Alessi, supra,* and only a cryptic footnote reference to the Ninth Circuit's holding in *Launius* v. *United States, supra.*

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[1] The panel which heard the first appeals, and entered the first opinion, was composed of Chief Judge Seth, Judge Holloway and Judge Markey of the Court of Customs and Patent Appeals, sitting by designation; the panel which heard the second appeals, and entered the opinion now here for review, was composed of Judges McKay and Logan of the Tenth Circuit and Senior Circuit Judge Peck of the Sixth Circuit, sitting by designation.

REASONS FOR GRANTING THE WRIT

(1) In *Abney* v. *United States*, this Court held that immediate appeal lies from "*a* pretrial order denying *a* motion to dismiss *an* indictment on double jeopardy grounds" (431 U.S., at 653; emphasis added). The Court of Appeals below has now held that a pretrial Double Jeopardy Clause appeal is allowable only from a pretrial order denying "a particular" double jeopardy claim, even though jeopardy has unquestionably attached to petitioners. This holding simply cannot be reconciled with the unqualified statement of the issue presented in *Abney* and the equally unequivocal holdings of *Crist* v. *Bretz*, *supra*, and *Menna* v. *New York*, *supra*. The limitation on the rule of *Abney* announced below is squarely in conflict with *United States* v. *Alessi*, 536 F.2d 978, 979-981 (2d Cir. 1976), which would, obviously, mandate a contrary result. In *Alessi*, there had been *no* previous trial whatsoever. Alessi's sole contention was that a pending *first* trial was barred by a previous plea agreement. 536 F.2d, at 979. The Court of Appeals for the Second Circuit held this contention sufficient to support an immediate pretrial appeal on Due Process Clause grounds which were analogous to a Double Jeopardy Clause argument, reasoning that, if Alessi was correct, the trial itself would be illegal. *Accord*, *United States* v. *Griffin*, 617 F.2d 1342, 1343-1346 (9th Cir. 1980); *contra*, *United States* v. *Eggert*, No. 80-1244, Slip Op. pp. 4-5, ____F.2d ____, ____ (10th Cir. 1980).

The conflict is not isolated. In *Rumpf* v. *United States*, 576 F.2d 818, 821-823 (10th Cir.) *cert. denied*, 439 U.S. 893 (1978), a sharply divided court refused to apply *Abney at all* to a pending Double Jeopardy Clause appeal even though

the notice of appeal had been timely filed. In so holding, the majority rejected the contrary holding of the Court of Appeals for the Ninth Circuit in *Moroyoqui* v. *United States*, 570 F.2d 862, 864 (9th Cir. 1977).

Judge McKay's warning, dissenting in *Rumpf*, that allowing the government to achieve such a *fait accompli* was

> "... an open invitation to trial courts [in the Tenth Circuit] to disregard *Abney* ... secure in the knowledge that the Court of Appeals will not [intervene]", 576 F.2d at 826-827,

does not yet appear to have become a reality.[2] But these deep divisions within the Court of Appeals for the Tenth Circuit and the sharp conflict between the Tenth Circuit and other Circuits on a crucial question of appellate jurisdiction demonstrate the need for plenary review here. *Browder* v. *Director, Department of Corrections*, 434 U.S. 257, 266-267 (1978).

The cases now presented for review vividly demonstrate an unsettling course of decisions in the Court of Appeals for the Tenth Circuit both in these appeals, and closely related ones, which is deeply troubling to the district courts and the bar alike.

In its *first* dismissal of these appeals, *United States* v. *Abraham*, No. 79-1017 and 79-1018 (unpublished; 10th Cir. 1979), *cert. denied*, ____ U.S. ____, 100 S.Ct. 137 (1979), the Court of Appeals held that the *issue* of double jeopardy

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[2] For example, the conscientious district judge below stayed all proceedings pending appeals herein, and pending disposition of this petition for a writ of certiorari. App. A, pp. 1, 2, 12.

was "not ripe for review" because jeopardy had not "attached", *citing, Serfass* v. *United States*, 420 U.S. 377, 388 1975). App. A, p. 16. As the experienced district judge to whom these cases were assigned on remand correctly held, the only rational interpretation of the *Abraham* decision was that the double jeopardy question would become "ripe for review" upon the attachment of jeopardy through the empaneling of the jury. App. A, p. 14 (Thompson, J.).

In the *second* dismissal, now presented for review here, the Court of Appeals informed the district court that, "We did not intimate [in *Abraham*] that interlocutory appeals would later lie upon attachment of jeopardy", App. A, pp. 4, 5, and *again* entered a jurisdictional dismissal.

Decisions from the time of *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 168 (1874) to *Perlman* v. *United States*, 247 U.S. 7 (1918) and *Abney* itself reflect that meaningful appellate review of vital decisions in federal felony prosecutions is not a subject to be treated as a game. A defendant in such a case is not to be denied meaningful review, at a meaningful time, by contortions which transform the unequivocal holding of *Abney* into "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards* v. *California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring). Six and one-half decades ago, this Court rejected out of hand the notion a citizen facing an unconstitutional criminal charge "was powerless to avert the mischief . . . but must accept its incidence and seek a remedy at some other time . . ." *Perlman, supra*, 247 U.S. 7, 9.

More than sixty years ago, in the related context of a government attempt to circumscribe a defendant's rights on a double jeopardy issue, Mr. Justice Holmes wrote for this Court:

> "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence are *less* that those which protect from a liability in debt . . . It cannot be . . . [that] one [type of ruling] that a defendant [cannot be prosecuted] *as a matter of substantive law* is not as good as another." *United States* v. *Oppenheimer*, 242 U.S. 85, 87 (1916) (emphasis added).

So here. It cannot be that the guaranty of the Double Jeopardy Clause is less worthy of appellate protection than a civil defendant's right to protection against strike suits. *Compare*, the straightforward holdings of *Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U.S. 541, 546-547 (1949), *Perlman*, *supra*, or *Abney*, *supra*, with the gyrations in these appeals.

The need for review of the quagmire which the decision below will create is, we submit, self-proving.

(2) The court below was persuaded by the government to read much into a passing comment in The Chief Justice's opinion in *Abney*. *See*, 431 U.S., 660. The Chief Justice there noted that the Solicitor-General suggested a distinction between the Double Jeopardy Clause's protection against multiple punishments and its protection against multiple trials. App. A, pp. 6, 7, *citing*, 431 U.S., at 660. It is inconceivable that The Chief Justice meant to qualify the holding of *Abney* by way of this passing comment.

This is true for several reasons. First, the Solicitor-General's lengthy brief in *Abney*, Brief for the United States, No. 75-6521, O.T., 1976, does not contain one word of argument for such a "distinction". Quite the contrary. The brief consistently treats the Double Jeopardy Clause as a whole (*see especially*, Br. pp. 38-44 and n.32). Second, The Chief Justice surely would not have carved such an important exception from a *jurisdictional* holding by way of a casual passing comment in light of this Court's repeated holdings as to the "imperative . . . that jurisdictional requirements be explicit and unambiguous." *Browder* v. *Director, Department of Corrections*, 434 U.S. 257, 266-267 (1978); *see also, Serfass* v. *United States*, 420 U.S. 377, 384 (1975) (Burger, C.J.), *quoting, United States* v. *Sisson*, 399 U.S. 267, 307 (1970) (Harlan, J.) ("Clarity is to be desired in any statute, *but in matters of jurisdiction it is especially important.*"). The contrary result reached by the Court of Appeals below is simply wrong. The morass created by the opinion below should be reviewed and corrected by this Court.

(3) The incoherence of the "line" which the court below has attempted to draw is well-illustrated by the court's admission that denial of a motion to dismiss a superseding indictment on double jeopardy grounds *is* immediately appealable, and its admission that an order overruling a motion to dismiss on double jeopardy grounds as to a superseding indictment, or declaration of a mistrial, *is* immediately appealable. App. A, p. 6, n.3, *citing, United States* v. *Sebastian*, 562 F.2d 211, 214 (2d Cir. 1977) and *United States* v. *Cerilli*, 558 F.2d 697, 699 (3rd Cir.)*cert. denied*, 434 U.S. 966 (1977). And, as the court below admits, in *United*

States v. *Barket*, 530 F.2d 181, 185 and n.7 (8th Cir. 1975) *cert. denied*, 429 U.S. 917 (1976), a decision cited in *Abney*, *see*, 431 U.S., at 664, the Court of Appeals allowed an immediate pretrial appeal from a district court's order denying a motion to dismiss *one count* in an indictment on double jeopardy grounds. Further, although the court below attempted to "distinguish" the decision of the Court of Appeals for the Ninth Circuit in *Launius* v. *United States*, 575 F.2d 770, 771 (9th Cir. 1978), the fact is that there is no distinction which rises to the level of legal difference. In *Launius*, the government argued, and the district court was persuaded to agree, that this Court's decision in *Menna* v. *New York*, *supra*, 423 U.S. 61, 62, n.2, applied only to "sequential" double punishment, and not to double punishment achieved "simultaneously" through one indictment which, by its terms, offended the Double Jeopardy Clause. In reversing, the Court of Appeals squarely held: *"We see no basis for such a distinction." Id.* (emphasis added). The statement of the Court of Appeals below that "*Launius* does not govern these cases", App. A, p. 6, n.4, is simply a holding that the Courts of Appeals for the Ninth and Tenth Circuits are in conflict. And, as noted, *United States* v. *Alessi*, *supra*, 536 F.2d at 979-981 (2d Cir. 1976), is flatly contrary to the holding below. The conflict is important and should be resolved by this Court.

Apart from the conflict, the holding below should be reviewed here. On the reasoning of the court below, if a mistrial had been granted because of a prejudicial opening statement by the prosecution, or if a single witness had been called and during the course of that witness's testimony, a mistrial had been granted, or if, prior to *any* testi-

mony, a superseding indictment had been returned, the question of whether the government could still prosecute would, the court below admits, be an immediately appealable order under *Abney*, App. A, p. 6, n.3. Yet, according to the court below, a district court's denial of a motion to dismiss an indictment which shows on its face that it is vitiated by the Double Jeopardy Clause cannot be immediately appealed prior to trial under *Abney* even *after jeopardy has attached to all defendants through the* empanelment and swearing of a jury, *cf, Crist* v. *Bretz*, 437 U.S. 28 (1978); *Downum* v. *United States*, 372 U.S. 754 (1963). Appealability under *Abney* is thus made to turn on the *particular* stage of the proceedings which may exist in each *particular* district court in each *particular* case, even though jeopardy has unquestionably attached. Such a holding brings to mind the warning of a great Justice of this Court: "The attempted distinction . . . will plunge this branch of the law into a Serbonian Bog." *Landress* v. *Phoenix Mutual Insurance Company*, 291 U.S. 491, 499 (1934) (Cardozo, J.). The holding trivializes the protection against violation of the Double Jeopardy Clause which *Abney* was designed to vindicate in one of its most important contexts, and has the practical vice of creating great and needless uncertainty on the part of both the district courts and the bar as to the precise factual circumstances under which the rule announced in *Abney* applies. Such uncertainty with regard to a jurisdictional issue is intolerable. *See, Browder* v. *Director, Department of Corrections*, 434 U.S. 257, 266-267 (1978). The requirement of intensive scrutiny of each *particular* set of facts on each *particular* appeal from a motion to dismiss an indictment on Double Jeopardy Clause grounds in an attempt to decide if it is an appealable

order is senseless. Time and again this Court has emphasized, especially in federal criminal cases, that the need for "clarity . . . in matters of jurisdiction" is essential. *Serfass* v. *United States, supra* (Burger, C.J.); *United States* v. *Sisson, supra* (Harlan, J.); *Browder, supra. Abney* itself was clearly written with a deliberate view toward avoiding such case-by-case, fact-intensive inquiry to determine whether an immediate appeal lies from any *particular* order of a district court overruling any *particular* motion to dismiss an indictment on Double Jeopardy Clause grounds, so long as the *substantive* question presented arises under the Double Jeopardy Clause. *See, United States* v. *Oppenheimer, supra. Abney* has been so understood by scholarly commentators on federal procedure. *See,* 15 Wright, Miller & Cooper, *Federal Practice and Procedure,* §3918 (1979 Supp.):

> "The *Abney* decision is written in terms that appear to cover *all* motions to dismiss on double jeopardy grounds . . . [because] immediate appeal provides the *only effective protection* of the important purpose of the double jeopardy guaranty to insulate not only against conviction, but also against personal strain, public embarrassment, and expense of an *improper* criminal trial." (emphasis added).

Accord, Helstoski v. *Meanor,* 442 U.S. 500, 506-508 (1979); *United States* v. *Alessi,* 536 F.2d 978, 979-981 (2d Cir. 1976); *United States* v. *Griffin,* 617 F.2d 1342, 1344-1346 (9th Cir. 1980); *contra, United States* v. *Eggert, supra,* No. 80-1244, ___ F.2d ___ (10th Cir. 1980); *and, Rumpf* v. *United States,* 576 F.2d 818 (10th Cir. 1978).

There is no need to look to hypotheticals to ascertain the confusion which the holding below has generated and,

unless corrected here, will continue to generate. In this very case, not one, but two, able and experienced district judges have ruled on the merits of the Double Jeopardy Clause claim. Both have held that their respective orders adjudicating the merits of the Double Jeopardy Clause claim were immediately appealable under *Abney*. *See*, App. A, pp. 11, 12 (Thompson, J.) and p. 20 (Eubanks, J.). Both have been reversed. In the cases now here for review, the reversal and dismissal of the appeals is made to turn on shadowy, subtle distinctions. The holding below will create rampant confusion with regard to one of this Court's most important decisions interpreting 28 U.S.C. §1291. Both the holdings and the principles announced in this Court's decisions condemn such a result. *Browder, supra*, 434 U.S., at 266-267; *Serfass, supra*, 420 U.S., at 384; *Sisson, supra*, 399 U.S., at 307.

(4) The fundamental flaw in the reasoning of the court below is that it confuses the *substantive* question of *whether* there has been a violation of the Double Jeopardy Clause with the *procedural* means for reviewing that substantive question. *See, United States* v. *Oppenheimer, supra*; *Menna* v. *New York, supra*. The first question is one of constitutional law; the latter is one involving the proper interpretation of 28 U.S.C. §1291. This Court had occasion to reiterate the distinction in *Browder*. There, the Court reversed the Court of Appeals because that court had "confuse[d] error with non-finality and had fail[ed] to distinguish between [the substantive issue of law presented] and the procedural means for correcting asserted error. . . ." The same is true here. The *substantive* question of constitutional law presented by these cases is: does the indict-

ment on file herein show on its face that it is vitiated by the Double Jeopardy Clause and is "the charge [therefore] one which the [government] may not constitutionally prosecute", *Menna* v. *New York*, 423 U.S. 61, 62, n.2? This is a question to be decided by an interpretation of the Double Jeopardy Clause. *See, e.g., North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969); *Sanabaria* v. *United States*, 437 U.S. 54, 69-70 (1978); and *Whalen* v. *United States*, ___ U.S. ___, 100 S.Ct. 1432, 1434-1440 (1980).

The *procedural* question of *how* and *when* this constitutional question is to be given appellate review must be answered by reference to the controlling statute, 28 U.S.C. §1291, together with its concomitant "collateral order" doctrine as announced, for Double Jeopardy Clause claims, in *Abney* v. *United States, supra.*

As this Court emphasized in *Browder:*

> "The confusion that [would result] from litigant's divergent views of the completeness of proceedings [needed to invoke the rule of appealability] would be wholly at odds with the *imperative* that *jurisdictional requirements be explicit and unambiguous.*" 434 U.S., at 267 (emphasis added).

Like the Seventh Circuit in *Browder*, the Court of Appeals here has overlooked the "imperative that jurisdictional requirements be explicit and unambiguous." A "rule" such as that announced by the court below — by which appellate jurisdiction turns on subtle nuances of factual distinctions to be resolved *ad hoc* on each appeal, despite the fact that jeopardy has attached — is intolerable in a judicial system in which great and grave consequences turn on the concept of "finality". *See, e.g., Helstoski* v. *Meanor, supra;*

Browder v. *Director, supra*; and *United States* v. *Robinson*, 361 U.S. 220, 224, 229 (1960).

Indeed, under the *first* decision on appeal of the court below in these very cases, *United States* v. *Abraham, et al.*, Nos. 79-1017 and 79-1018 (10th Cir., May 15, 1979, *amended*, June 15, 1979) *cert. denied*, — U.S. —, 100 S.Ct. 137 (1979), the *substantive* question of Double Jeopardy Clause jurisprudence became "ripe for review", App. A, pp. 16, 17, upon the empaneling and swearing of the jury. *See, Crist* v. *Bretz, supra; Downum* v. *United States, supra.* The Court of Appeals at least appeared to so recognize on the first appeal of these cases, and its first opinion was so understood by the conscientious District Court which interpreted it on remand. App. A, pp. 11-14. Once the *substantive* question of constitutional law became ripe for adjudication, the *procedural* mechanism for adjudicating it, i.e., a motion to dismiss in the District Court and, if the motion was denied, an immediate appeal to the Court of Appeals, as authorized by *Abney*, were the proper *procedural* means for vindicating the substantive Double Jeopardy Clause right. The failure of the court below to distinguish between these two entirely different concepts led the court into the same error which this Court was obliged to correct in *Browder* v. *Director, Department of Corrections*: the court below confused the issue of substantive law presented to it with the procedural means for properly adjudicating that issue. This fundamental error, with its attendant confusion, should be corrected by this Court.

In sum, the decision below is in irreconcilable conflict with controlling decisions of this Court; hopelessly confuses the substantive issue of constitutional law under the Double

Jeopardy Clause presented with the procedural means for adjudicating that question in a fashion which this Court has squarely held to be erroneous, and carves an exception from the procedural rule of *Abney* and the substantive holdings of *Crist* and *Menna* which is wholly unjustifiable. The decision should be reviewed and reversed by this Court.

(5) The double-felony indictment of *both* two small three-person partnerships, one of them (Central Liquor Company) a *family* partnership of mother, father and son, and one of the partners in each, for the identical alleged acts, offends the Double Jeopardy Clause of the Fifth Amendment. A small partnership, and especially a family partnership is, like a sole proprietorship, a mere aggregation, a name with no separate personal existence. This has been the law in the federal courts from the inception of the federal judiciary. *See, e.g., Francis* v. *McNeal*, 228 U.S. 695, 698 (1913) (Holmes, J.); *Helvering* v. *Smith*, 90 F.2d 590, 591 (2d Cir. 1937) (L.Hand, J.); *Randolph Products Company* v. *Manning*, 176 F.2d 190, 192 (3rd Cir. 1949); *Weingarten* v. *Universal CIT Credit Corporation*, 302 F.2d 1, 2 (2d Cir. 1962); *Rosenzweig* v. *General Services Administration*, 299 F.2d 22, 27-29 (Em.App. 1962) *cert. denied*, 369 U.S. 818 (1963) (Maris, C.J.); *see generally, Report of Proceedings of the Committee on Commercial Law*, Final Draft, *Uniform Partnership Act*, National Commissioners on Uniform State Laws, *Annual Report*, 1911, pp. 32-33.

The power of *Congress* to adopt a rule by which an information or indictment may be filed against a partnership *alone*, in order to reach the assets of the partnership by way of a criminal fine, though left in doubt by the af-

firmance, by an equally divided Court, of the dismissal of an information filed against a partnership in *United States* v. *American Freightways Co.*, 352 U.S. 1020 (1957) was settled, at least as to regulatory, misdemeanor violations, by the decision the next Term in *United States* v. *A & P Trucking Co.*, 358 U.S. 121 (1958), and is not challenged here. Rather, the Double Jeopardy Clause question presented here is the question specifically *reserved* by the *A & P* Court, to-wit, whether the Double Jeopardy Clause forbids a double-felony indictment of *both* a small family partnership[3] and one of the individual partners therein for identical alleged acts. *Compare, United States* v. *A & P Trucking Co., supra,* 358 U.S., at 126, n.6 *with, Gordon* v. *United States,* 347 U.S. 909 (1953). And, we reiterate, no question going to power of *Congress* is presented here. *Cf., Sanabaria* v. *United States,* 437 U.S. 54, 69-70 (1978); *Simpson* v. *United States,* 435 U.S. 6, 11-14 (1979); *Whalen* v. *United States,* ___ U.S. ___, 100 S.Ct. 1432, 1436-1440 (1980). We do note that, with regard to the Sherman Act, there is not the slightest indication of any Congressional intent to authorize such an extraordinary double-felony indictment as is here presented. On the contrary, 15 U.S.C. §1 divides all potential offenders into two categories: "a corporation" and "any other person". Insofar as the legislative history of the Sherman Act sheds any light on this question, it indicates that Congress affirmatively intended *not* to attempt to equate partnerships and partners with corporations and officers therein, even assuming such power

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[3] as well as a small, long-extant three-person general partnership of three close, personal associates.

exists. *See*, 21 Cong. Rec., 51st Cong. 1st Sess., p. 2457 (1890):

> "A corporation may be, and usually is, a more powerful and useful combination than a partnership. It is an artificial person without fear of death, without a soul to save or a body to punish. . . ." (Sen. Sherman).

15 U.S.C. §7 makes reference to "associations". This language, presumably, renders a partnership indictable under 15 U.S.C. §1. *United States* v. *Brookman Company*, 229 F.Supp. 862 (N.D. Cal. 1964).

But that is a far cry from the question presented here. The question presented in this case is whether three-person partnerships, one of them a three-person family partnership composed of mother, father and son *and* one of the family member-partners (the son) may *both* be subject to a *double-felony* indictment for *identical* alleged acts. This, it will be recalled, is the question Mr. Justice Harlan carefully reserved in *United States* v. *A & P Trucking Company, supra*, even with regard to a regulatory misdemeanor. 328 U.S. 121, 126, n.6. And it surely cannot be argued that the innocuous words of 15 U.S.C. §7 have any bearing on the serious Double Jeopardy Clause question here presented. *See, Francis* v. *McNeal*, 228 U.S. 695, 698 (1913) (Holmes, J.) and *see especially, Rosenzweig* v. *General Services Administration, supra*, 299 F.2d 22, 27 (Maris, C.J.).

In *Rosenzweig*, Chief Judge Maris wrote for a unanimous court:

> "It is the complainant's [Rosenzweig's] contention that the criminal proceedings in which [his partners] were convicted, did not terminate in the conviction of

> [him] *since neither he nor Central Packing Company was either indicted nor convicted as a separate entity* in those proceedings. *In support of this proposition [Mr. Rosenzweig] relies upon United States* v. *A & P Trucking Co.*, 1958, 358 U.S. 121, 79 S.Ct. 203, 3 L.Ed.2d 165, ... *However, the rule of the A & P Trucking Co. case is inapplicable here. . . .*
>
> *"The [Government] contends that the conviction of the individual partners must be considered a conviction of the partnership. . . . We agree with this contention."* 299 F.2d at 27. (emphasis added).

If the Government was right in *Rosenzweig*, it is wrong here.

Regrettably, one Court of Appeals has overlooked both Mr. Justice Harlan's careful reservation of the Double Jeopardy question in *A&P*, and the other authority above discussed, especially *Rosenzweig*. A divided panel of the Court of Appeals for the Ninth Circuit in *Western Laundry & Linen Rental Co.* v. *United States*, 424 F.2d 441 (9th Cir. 1970) *cert. denied*, 400 U.S. 849, appeared to hold that under the Sherman Act, both a partnership and one of the partners therein could be indicted and convicted for the identical alleged acts. Whether *Western Laundry* actually so held is less than immaculately clear. In that case both the partnership and the partner had pled *nolo contendre* and had been sentenced. Not until substantially after the date of their sentencing did anyone raise the double jeopardy question, and then only by way of a motion to reduce sentence. 424 F.2d, at 442. Writing for the majority in *Western Laundry*, Judge Madden denied the motion. Judge Madden appears to have *agreed* that, if he believed the question open, he *would* have held the indictment of both

a general partnership and a general partner therein *did* violate the Double Jeopardy Clause. 424 F.2d, at 444. However, overlooking this Court's careful reservation of the double jeopardy question in *United States* v. *A & P Trucking Co., supra,* 358 U.S. 121, 126, n.6 and the Court's very careful distinction therein of *Gordon* v. *United States,* 347 U.S. 909 (1953), Judge Madden felt that *A & P Trucking* was dispositive, and that he had no choice other than to reject the double jeopardy claim, saying "[w]hen the ultimate authority has spoken, there is no room for further debate." 424 F.2d, at 445.

Of course, "the ultimate authority", that is, this Court, had *not* spoken to this question in *A & P* — it had been careful to reserve any intimation upon it. As Judge Hufstedler stated, dissenting on the double jeopardy issue in *Western Laundry*, this Court's decision in *A & P* involved *only* an attempt to file an information against a motor carrier partnership *alone* in order to levy a fine against the partnership for the improper packaging of high explosives. Not only was there no question of double jeopardy present in *A & P*, there *could* have been *no question of double jeopardy* present in *A & P* because *A & P* was a case in which the individual partners were *"completely free of personal guilt."* 358 U.S. 121, at 126 (emphasis added).

In deference to the *Western Laundry* majority, however, both the district judges who ruled on the Double Jeopardy Clause claim in this case allowed the instant double-felony indictment of both two small, three-person partnerships, one of them a small *family* partnership and one of the partners in each to remain in court, solely on the authority of *Western Laundry*. The first judge to hear

the motions to dismiss, Judge Luther B. Eubanks, expressly stated that, but for *Western Laundry,* the defendants would have "*no difficulty* persuading me that *we have double jeopardy here.*" (Tr., Jan. 4, 1979, p.19, ln.23 through p.20, ln.1; emphasis added). The District Court was right. Indictment of one member of a small three-person partnership, *and* indictment of the general partnership is, in legal effect, an indictment of the partner twice. It impermissably doubles the quantum of punishment in a manner directly analogous to that held forbidden in *Sanabaria* v. *United States, supra,* 437 U.S., at 69-70; impermissably imposes "multiple punishments for the same offense" in a manner forbidden by *North Carolina* v. *Pearce,* 395 U.S. 711, 717 (1969), and impermissably allows the *prosecution* to double the punishment for an alleged offense, a power which "resides wholly with Congress", *Whalen* v. *United States,* ____ U.S. ____, 100 S.Ct. 1432, 1436, 1439-1440 (1980). Such an indictment "seriously offend[s] the principle of the separation of governmental powers embodied in the Double Jeopardy Clause of the Fifth Amendment . . ." *Whalen, supra.* Especially is this true with regard to Central, a small *family* partnership where there is the pre-existing relationship of confidentiality found among mother, father and son. *Bellis* v. *United States,* 417 U.S. 85, 101 (1974), *citing, United Statesv. Slutsky,* 352 F.Supp. 1100, 1108 (S.D. N.Y. 1972).

The indictment shows on its face that it is vitiated by the vice of double jeopardy and, thus, constitutes a "*charge* . . . upon which the [government] may not constitutionally *prosecute.*" *Menna* v. *New York, supra,* 423 U.S., at 62, n.2 (emphasis added). The indictment should, therefore, be dismissed.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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October, 1980

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States, hereby certifies that three (3) true and correct copies of the foregoing Petition for a Writ of Certiorari were mailed, by certified mail, postage fully prepaid, to all parties required to be served, to-wit, the Honorable Wade H. McCree, Jr., Solicitor-General, Office of the Solicitor-General, United States Department of Justice, Washington, D.C. 20530, this _____ day of _____, 1980.

_____

BERNARD J. ROTHBAUM, JR.

Appendices

APPENDIX A

[Filed September 5, 1980]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	NO. CR-78-00215-T
CENTRAL LIQUOR COMPANY,	)	
JARBOE SALES COMPANY,	)	
LOUIS ABRAHAM, JR. and	)	
ROBERT Z. NAIFEH,	)	
	)	
Defendants.	)	

ORDER

Defendants herein have moved to continue the stay of proceedings entered November 20, 1979, pending the disposition of defendants' Application for Rehearing En Banc and Petitions for Writs of Certiorari, and briefs have been received from all parties. A jury was selected to try this case on November 20, 1979, and it is clear that, should the case be recommenced, and should either the Court of Appeals or the Supreme Court choose to consider the issues raised by defendants on appeal, the trial would have to interrupted again and the jury again sent home to await recall for another resumption of trial. Recalling the jury for trial prior to final resolution of the issues being appealed, when further delays may be forthcoming, is a potentially expensive and inconvenient procedure not only for the jurors, but for the parties and the Court. In light of the already lengthy postponement of trial, any interest in expediting the trial of this case does not balance heavily enough to outweigh the inconvenience, expense and inter-

ruption in the presentation of complex testimony should further delay be required after the jury is recalled.

IT IS THEREFORE ORDERED that the stay of trial, entered November 20, 1979, is hereby continued, until further order of the Court.

Plaintiff's Motion for Trial Conference is granted, but said conference shall be postponed until a trial date can be set.

IT IS SO ORDERED this *5th* day of September, 1980.

(s) *Ralph G. Thompson*
UNITED STATES DISTRICT JUDGE

PUBLISH

[Filed August 11, 1980]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
vs.	)	Nos. 79-2204
	)	79-2205
CENTRAL LIQUOR COMPANY,	)	79-2206
JARBOE SALES COMPANY,	)	79-2207
LOUIS ABRAHAM, JR. and	)	
ROBERT Z. NAIFEH, Defendants-Appellants	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. Cr. 78-00215-T)

Burck Bailey of Fellers, Snider, Blankenship, Bailey and Tippens, Oklahoma City, Oklahoma, for Appellant Central Liquor Company.

B. J. Rothbaum, Jr. (with James P. Linn on the brief) of Linn, Helms, Kirk & Burkett, Oklahoma City, Oklahoma, for Appellant Robert Z. Naifeh.

John B. Jarboe (with Irvine E. Ungerman on the brief), Tulsa, Oklahoma, for Appellant Jarboe Sales Company.

Tom L. Armstrong of Dyer, Powers, Marshal, Turner & Armstrong, Tulsa, Oklahoma, for Appellant Louis Abraham, Jr.

Peter L. de la Cruz, Attorney, Department of Justice, Washington, D.C. (with John H. Shenefield, Assistant Attorney

General, and Barry Grossman, Attorney, Department of Justice, Washington, D.C.; and Charles R. McConachie and Leonard A. Senerote, Jr., Attorney, Department of Justice, Dallas, Texas, on the brief), for Appellee.

Before McKAY and LOGAN, Circuit Judges, and PECK, Senior Circuit Judge.*

McKAY, Circuit Judge.

The government has invoked the Sherman Act felony provision, 15 U.S.C. § 1, to indict both two small partnerships[1] and the most active partner of each. After a jury was empaneled, the district court denied motions to dismiss the indictments and stayed the proceedings pending prosecution of these appeals. Defendants argue that indictment of both a small partnership and an individual partner for the same activity is precluded by the double jeopardy clause, and they seek immediate review of the district court's actions under the doctrine of *Abney* v. *United States*, 431 U.S. 651 (1977).

These cases have previously been presented to this court. When defendants sought to raise the double jeopardy issue before a jury had been empanelled, we dismissed the appeals, holding that the issue was "not ripe for review." *United States* v. *Abraham*, No. 79-1017, slip op. at 2 (10th Cir. May 15, 1979, *amended*, June 15, 1979), *cert. denied*, 100 S.Ct. 137 (1979). We noted that, before a double jeopardy claim may be raised, a defendant must first have been put in jeopardy. Slip op. at 3. We did not intimate

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*Honorable John W. Peck, Senior United States Circuit Judge, Sixth Circuit Court of Appeals, Cincinnati, Ohio, sitting by designation.

[1] One of the partnerships is composed of three family members — son, father and mother. The other consists of three unrelated persons.

that interlocutory appeals would later lie upon attachment of jeopardy.

After the *Abraham* decision, the district court empanelled a jury, denied renewed dismissal motions, and stayed the proceedings. These appeals followed.[2] The district court exercised commendable caution to insure that no constitutional rights of the defendants would be violated by a precipitate move toward an unwarranted trial. The court recognized that, although *Abney* may be distinguishable from the instant cases, no extant authority specifically precluded interlocutory appeal. *See* Record, vol. 2, at 515.

Under the circumstances of these cases, appellate jurisdiction must be found, if at all, under 28 U.S.C. § 1291. The statutory phrase "final decisions" has been defined to include those decisions falling within the "collateral order" doctrine. *See Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949). *See also Helstoski* v. *Meanor*, 99 S.Ct. 2445, 2449 (1979). In *Abney* v. *United States*, 431 U.S. 651 (1977), the Supreme Court held that a district court's denial of a particular double jeopardy claim was a collateral order and thus immediately appealable.

The *Abney* petitioners had undergone one trial. Had they not been permitted to appeal prior to a retrial, a significant protection of the double jeopardy clause would have been irretrievably lost: "[T]he guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the

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[2] After these appeals were filed, the government moved to dismiss on jurisdictional grounds. By order of March 4, 1980, this court denied the motion. Although the jurisdictional issue was briefed at that time, no res judicata effect attaches to our previous denial. As a court of limited jurisdiction, we are bound to review jurisdictional issues at all stages of the proceedings. Denial without opinion of a routine pre-argument motion to dismiss connotes at most this court's desire for further argument.

personal strain, public embarrassment, and expense of a criminal trial *more than once* for the same offense." 431 U.S. at 661 (emphasis added).[3] *See United States* v. *Ritter*, 587 F.2d 41, 43 (10th Cir. 1978). Although defendants here are not facing a second trial, they suggest that the *Abney* rationale extends to all *charges* which, on double jeopardy grounds, the government may not constitutionally prosecute. In the alternative, they maintain that, "[i]n every practical sense," they face the specter of two trials. Appellants' Memorandum on Appealability at 8.

The right not to be tried more than once and the right not to receive multiple convictions and punishments for the same offense are both protected by the double jeopardy clause, but they are conceptually distinct rights.[4] In *Abney*, the Court sought to protect through interlocutory appeal only the prohibition against multiple prosecutions — i.e., "repeated attempts to convict an individual for the same offense." 431 U.S. at 661 (quoting *Green* v. *United States*, 355 U.S. 184, 187 (1957)). As the Court stressed, "[T]he Double Jeopardy Clause [also] protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal

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[3] "Trial" should, of course, be read expansively. *Cf.* United States v. Sebastion, 562 F.2d 211, 214 (2d Cir. 1977) (denial of double jeopardy motion to dismiss superseding indictment appealable); United States v. Cerilli, 558 F.2d 697, 699 (3d Cir.) (interlouctory double jeopardy appeal following mistrial), *cert. denied*, 434 U.S. 966 (1977).

[4] Defendants, relying on Launius v. United States, 575 F.2d 770 (9th Cir. 1978), argue that there is no basis for a distinction between sequential double jeopardy and the double jeopardy resulting from one multiplicitous indictment. *Launius* does not govern these cases. The *Launius* court was not concerned with the distinction between multiple trials and multiple punishments. It considered only whether there is a substantive difference between multiple punishments imposed through one trial and those resulting from many trials. *Id.* at 771. Clearly that distinction is irrelevant for double jeopardy purposes.

following final judgment." 431 U.S. at 650.[5] *See United States* v. *Padilla*, 589 F.2d 481, 483 (10th Cir. 1978).

Should both the individual partners and the partnerships be convicted in these cases, this court would be presented with a pure double jeopardy question, unsullied by a need to reconsider the jury's factual findings. Any possible juror prejudice from an unjustified pyramiding of charges would be irrelevant to our double jeopardy review. Thus, post-conviction appeals would be totally effective in protecting defendants' rights not to be twice convicted for the same offense.

Of course, the defendants' concern is not limited to the danger of dual convictions. The probability of a conviction on *one* count increases as more charges are included in a particular trial. However, except in the multiple prosecutions context, the double jeopardy clause does not protect against a single conviction. If indeed the trial results in conviction of only the individual partners or only the partnerships, our review on appeal would follow a due process analysis, directed to the prejudicial effects of the multiple charges. This court must often undertake such analysis on post-conviction review. Interlocutory appeal from unsuccessful challenges to criminal indictments is, in other contexts, generally not permitted precisely because the danger of delay is not counterbalanced by any irreparable threat to a defendant's constitutional rights. *See, e.g., Parr* v. *United States*, 351 U.S. 513, 518-21 (1956); *Cobbledick* v. *United States*, 309 U.S. 323, 324-25 (1940). This time-honored policy should also govern here.

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[5] United States v. Barket, 530 F.2d 181 (8th Cir. 1975), *cert. denied*, 429 U.S. 917 (1976), relied on heavily by defendants, and cited in *Abney*, is quite consistent with this analysis. In *Barket*, it is true that there was but one indictment with two counts. The Eighth Circuit permitted an interlocutory appeal of the denial of a motion to dismiss one count. However, the appeal was taken only after trial on the other count had proceeded to judgment. *Id.* at 184.

As an alternative argument, defendants seek to fit the particulars of their cases within the multiple prosecutions doctrine. Because all defendants have retained their own attorneys to avoid any possible conflicts-of-interest, the expense and strategic complexity of a trial have been multiplied.

Standing alone, the additional expense for attorneys does not create a multiple prosecutions situation. Furthermore, defendants' assertion that the trial will become excessively complex, thereby increasing the "ordeal" they must suffer, is inconsistent with their theory of appealability. If it is true that each partnership and its controlling partner are one-and-the-same for Sherman Act purposes — as defendants argue — the complexity of the trial will be only superficially increased. The core of the government's case will necessarily be evidence applicable to both the partnership and the individual. Any trial is an ordeal, but defendants may not escape a single trial through application of the double jeopardy clause.

APPEALS DISMISSED.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

OFFICE OF THE CLERK
469 UNITED STATES COURTHOUSE
DENVER, COLORADO 80202

HOWARD K. PHILLIPS
CLERK

TELEPHONE
303-837-3157

August 11, 1980

Mr. Herbert T. Hope, Clerk
United States District Court for
the Western District of Oklahoma
Room 3210 U.S. Courthouse
Oklahoma City, OK 73102

Re: No. 79-2204, U.S.A. vs. Central Liquir Company
No. 79-2205, U.S.A. vs. Robert Z. Naifeh
No. 79-2206, U.S.A. vs. Louis Abraham, Jr.
No. 79-2207, U.S.A. vs. Jarboe Sales Company

Dear Mr. Hope:

Pursuant to Rule 41 of the Federal Rules of Appellate Procedure, effective July 1, 1968, as amended, I am enclosing a certified copy of the judgment, and a copy of the opinion, which shall constitute the mandate of this Court. You will please file this mandate in the records of your court immediately upon receipt of it by direction of this Court. I am also enclosing a form of receipt for you to sign and return to this office.

The original record on appeal will be returned to you under separate cover.

Sincerely yours,

HOWARD K. PHILLIPS, Clerk
(s) *Howard K. Phillips*

HKP:sm

Enclosures

cc: Mr. Burck Bailey, Fellers, Snider, Blankenship, Bailey & Tippens, 2700 First National Center, Oklahoma City, OK 73102

Mr. B. J. Rothbaum, Jr., Linn, Helms, Kirk & Burkett, Suite 410 Fidelity Plaza, Oklahoma City, OK 73102

Mr. Peter L. de la Cruz, Department of Justice, Washington, D.C. 20530

Mr. Charles R. McConachie, & Mr. Leonard A. Senerote, Jr., Department of Justice, Dallas, TX 75242

Mr. Irvine E. Ungerman, 1710 4th National Bank Bldg., Tulsa, OK 74119

Mr John P. Jarboe, 1210 Mid-Continent Bldg., Tulsa, OK 74103

[Filed November 20, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff	)	
vs.	)	
	)	No. CR-78-00215-T
CENTRAL LIQUOR COMPANY, JARBOE SALES COMPANY, LOUIS ABRAHAM, JR., and ROBERT Z. NAIFEH, Defendants	)	

ORDER

Upon renewal of defendants' Motion to Dismiss on double jeopardy grounds following the empaneling of a jury, the Court overruled said motion and granted a stay of proceedings pending appeal. *Western Laundry & Linen Rental Co.* v. *United States*, 424 F.2d 441 (9th Cir. 1970), cert. denied 400 U.S. 849, provides the only authority directly relevant to the issue before the Court. In that case, the Ninth Circuit held that an indictment charging both an individual and a partnership of which he was a partner, for violations of the Sherman Act, did not violate the double jeopardy clause. The opinion is well reasoned and convincing and no better authority can be found. Based upon *Western Laundry*, therefore, the Court hereby overrules defendants' Motion to Dismiss.

The government argues that defendants are not entitled to immediate appeal upon renewal of the motion following the empaneling of a jury, or a stay of proceedings pending appeal, because the question raised by defendants is one of dual punishment for one offense, rather than a second trial on the same offense. Plaintiff argues that the right of immediate appeal announced in *Abney* v. *United States*, 431 U.S. 651 (1977), does not apply to this

fact situation. The Court is unable to agree with plaintiff that defendants have no right to a stay of trial pending appellate review, if sought. The distinction between multiple punishment and multiple trial, drawn by the government, may have validity. However, absent a clear pronouncement either in the Tenth Circuit or the Supreme Court on this issue, this Court will not speculate on what the law may turn out to be. The question for review in *Abney*, as stated by the Supreme Court, was "whether a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds is a final decision . . . and thus immediately appealable." 431 U.S. 651, 653. The question was answered in the affirmative. While the facts in *Abney* are distinguishable from those of the double jeopardy question before this Court, the right of immediate appeal announced in *Abney* has not been modified or limited as suggested by the government and thus the Court is obliged to and will apply *Abney* to allow these defendants, under the facts of this case, the right of immediate appeal of the denial of a motion to dismiss based on double jeopardy grounds.

In accordance with the foregoing, defendants' Motion to Dismiss is denied. These proceedings are stayed pending appeal.

It is so ordered this *20th* day of November, 1979.

(s) *Ralph G. Thompson*
UNITED STATES DISTRICT JUDGE

[Filed November 1, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff	)	
vs.	)	
CENTRAL LIQUOR COMPANY, JARBOE SALES COMPANY, LOUIS ABRAHAM, JR., and ROBERT Z. NAIFEH, Defendants	)	No. CR-78-00215-T

ORDER

This case is before the Court on the motion of defendants Naifeh and Abraham for reconsideration of their earlier Motion to Dismiss the Indictment on double jeopardy grounds. The issue has been fully briefed by the parties. The indictment in this case was returned in December, 1978, and charged a conspiracy to violate the Sherman Act against the two moving defendants and two partnerships of which each is a partner. The moving defendants moved to dismiss on double jeopardy grounds, claiming that charging the two partnerships and two individual partners for the identical acts violates the double jeopardy clause of the Fifth Amendment. The motion was denied by the Honorable Luther B. Eubanks of this Court in January, 1979, and defendants took an immediate appeal, pursuant to *Abney* v. *United States,* 431 U.S. 651 (1977). The Tenth Circuit stated that the double jeopardy claims were not ripe for review and dismissed the appeal. *United States* v. *Abraham and Naifeh,* Nos. 79-1017 and 79-1018 (10th Cir. May 15, 1979, as modified June 15, 1979). The United States Supreme Court denied certiorari, ___ U.S. ___, 48 U.S.L.W. 3221, and upon remand, defendants again raise their double jeopardy claim. It is this renewal, styled Motion for Reconsideration, which is presently before the Court.

Although the parties disagree as to the precise ruling of the Tenth Circuit in its opinion, it is clearly stated that the issue "is not ripe for review" (slip op. p. 1) and apparently will not become so until a jury is empaneled. The Court must therefore deny defendants' motion at this time as being unripe; however, under the reasoning employed by the Tenth Circuit in its opinion on appeal, the issue will become ripe upon the empaneling of a jury in this case. Defendants' motion is therefore denied.

It is so ordered this *1st* day of November, 1979.

(s) *Ralph G. Thompson*
UNITED STATES DISTRICT JUDGE

NOT FOR ROUTINE PUBLICATION

[Filed May 15, 1979)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 79-1017, 79-1018

UNITED STATES OF AMERICA,	)	
	)	Appeal From The
Appellee,	)	United States
v.	)	District Court For
	)	The Western District
LOUIS ABRAHAM, JR. and	)	of Oklahoma
ROBERT Z. NAIFEH,	)	(D.C. # CR-78-
	)	00215-E)
Appellants.	)	

Tom L. Armstrong, of Dyer, Powers, Marsh, Turner & Armstrong, Tulsa, Oklahoma, for Appellant, Louis Abraham, Jr.

B. J. Rothbaum, Jr., Oklahoma City, Oklahoma (James P. Linn, Oklahoma City, Oklahoma, and Linn, Helms, Kirk & Burkett, Oklahoma City, Oklahoma, of Counsel, with him on the Brief), for Appellant, Robert D. Naifeh.

Peter L. de la Cruz, Attorney, Department of Justice, Washington, D.C. (John H. Shenefield, Assistant Attorney General, Barry Grossman, Attorney, Department of Justice, Washington, D.C., and Barry F. McNeil and J. Michael Weston, Attorneys, Department of Justice, Dallas, Texas, with him on the Brief), for Appellee.

Before SETH, Chief Judge, MARKEY* and HOLLOWAY, Circuit Judges.

*Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

PER CURIAM.

These appeals present double jeopardy questions which are not ripe for review. On December 7, 1978, the grand jury empaneled within the Western District of Oklahoma handed down a one-count indictment which charged the appellants and their respective partnerships with criminal violations of section 1 of the Sherman Act, 15 U.S.C. § 1.

The individuals who are the appellants here, filed motions to dismiss the indictment on double jeopardy grounds. In these motions to dismiss and on appeal, appellants argue that if both the partner and his partnership were convicted, the partner would be subject to double punishment in that the partner would have to pay his personal fine as well as all or a share of the fine assessed against his partnership. The district court denied appellants' motions to dismiss, and they bring these appeals.

The Government contends that the district court's order overruling a motion to dismiss on double jeopardy grounds was proper as the defendant has not been put on trial for the first time. It seems apparent that to support a double jeopardy challenge, jeopardy must have attached at some stage of the proceedings. Illinois v. Somerville, 410 U.S. 458; United States v. Rich, 589 F.2d 1025 (10th Cir.); *see* Collins v. Loisel, 262 U.S. 426, 429. The Supreme Court in Serfass v. United States, 420 U.S. 377, stated:

> "The Court has consistently adhered to the view that jeopardy does not attach, *and the constitutional prohibition can have no application,* until a defendant is 'put to trial before the trier of the facts, whether the trier be a jury or a judge.'" 420 U.S. at 388 (emphasis added).

Since the defendant must first be put in jeopardy before a claim can be made that the double jeopardy clause is violated, these appellants, who have yet to be put in jeopardy

for the first time, cannot advance a double jeopardy challenge.

The appellants rely on certain language in Abney v. United States, 431 U.S. 651, as support for their contention that this court must decide these double jeopardy questions. They correctly point out the issue addressed by the Supreme Court:

> "We granted certiorari to determine whether a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds is a final decision within the meaning of 28 U.S.C. § 1291, and thus immediately appealable." 431 U.S. at 653.

They argue that since the Supreme Court did not recite that the defendant must first be put in jeopardy for such an appeal, the contention that jeopardy must attach before double jeopardy may be challenged on appeal is incorrect.

It is apparent that the Court in *Abney* was confronted by a case where the defendant had already been put on trial and was appealing prior to a subsequent prosecution for the same indictment. The Court in *Abney* expressly held that the threat of a *subsequent* trial was so severe that a defendant may appeal a double jeopardy challenge prior to that second trial. 431 U.S. at 660-62. *See* National Broadcasting Co. v. Niemi, 434 U.S. 1354, 1355.

We affirm the district court's overruling of the appellants' motions to dismiss the indictment.

[APPENDIX]

MAY TERM — JUNE 15, 1979

Before The Honorable Oliver Seth, Chief Judge, The Honorable Howard T. Markey, Chief Judge, U.S. Court of Customs and Patent Appeals,* and The Honorable William J. Holloway, Jr., Circuit Judge.

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
vs.	)	No. 79-1017
	)	79-1018
LOUIS ABRAHAM, JR., and ROBERT Z. NAIFEH, Defendants-Appellants.	)	

This matter comes on for consideration of appellants' petition for rehearing in the captioned cases, or in the alternative, for clarification of the judgment, and for stay of mandate pending certiorari.

Upon consideration whereof, the Court orders:

1. The judgments of this Court in the captioned cases are amended to state "The appeal is dismissed."

2. The petition for rehearing is otherwise denied.

3. The mandates in these cases are stayed to and including July 15, 1979 pending timely filing of petitions for writ of certiorari. If on or before that date there is filed with the Clerk of the Court of Appeals, a notice from the Clerk of the Supreme Court of the United States that appellant has timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

HOWARD K. PHILLIPS, Clerk

(s) *Robert L. Hoecker*
Chief Deputy Clerk

*Sitting by Designation.

[Filed January 17, 1979]

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	
	)	No. CR-78-00215E
CENTRAL LIQUOR COMPANY;	)	
JARBOE SALES COMPANY;	)	
LOUIS ABRAHAM, JR.; and	)	
ROBERT Z. NAIFEH,	)	
Defendants.	)	

ORDER OVERRULING MOTION TO DISMISS INDICTMENT ON FIFTH AMENDMENT GROUNDS

The individual Defendants herein, Robert Z. Naifeh and Louis Abraham, Jr., have each filed a Motion to Dismiss the instant indictment as to each of them as individuals. The asserted ground for said Motion to Dismiss is that the indictment of both a partner in a partnership, and the partnership, for the same offense places the partner in double jeopardy and in jeopardy of double punishment in violation of the Fifth Amendment to the Constitution of the United States.

The Government has filed a responsive brief in opposition to each of the Motions to Dismiss of the individual Defendants.

The Court has heard oral argument upon the Defendants' Motions and the Government's response thereto.

Based upon the Court's understanding of the holding of *United States* v. *A & P Trucking Co.*, 358 U.S. 121, 79 S.Ct. 203, 3 L.Ed.2d 165 (1958), as interpreted by the prevailing opinion of the Court of Appeals in *Western Laundry and Linen Rental Co.* v. *United States*, 424 F.2d 441

(9th Cir. 1970), cert. denied, 400 U.S. 849, the Court holds that the Motions to Dismiss on double jeopardy grounds filed by the Defendants Naifeh and Abraham must be overruled. While it appears that Defendants' arguments in favor of dismissal are supported by the specially concurring opinion of Judge Hufstedler in the *Western Laundry and Linen Rental Co.* case, the Court feels bound to follow the interpretation contained in the majority opinion of Judge Madden in said case.

The Court recognizes that under the decision of the Supreme Court in *Abney* v. *United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977) and the Court of Appeals for the Tenth Circuit in *United States* v. *Martinez*, 562 F.2d 633 (10th Cir. 1977), this Order is a final decision within the meaning of 28 U.S.C. § 1291 and therefore, appealable to the Court of Appeals for the Tenth Circuit.

(s) *Luther B. Eubanks*
LUTHER B. EUBANKS
UNITED STATES DISTRICT JUDGE

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS AND FEDERAL RULES OF PROCEDURE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "Nor shall any person be subject for the same offense to be twice in jeopardy of life or limb; . . ."

28 U.S.C. § 1291 provides in pertinent part:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ."

Federal Rules of Criminal Procedure 12(b) and 12(f) provide in pertinent part:

> "Any defense . . . which is capable of determination without the trial of the general issue may be raised before trial on motion. . . . The following must be raised prior to trial: . . . (2) defenses or objections based on defects in the indictment . . .; . . . Failure by a party to raise defenses or objections or to make requests which must be made prior to trial . . . shall constitute waiver thereof, . . ."

Federal Rule of Appellate Procedure 4(b) provides in pertinent part:

> "In a criminal case the notice of appeal by a defendant shall be filed in the district court within ten days after the entry of the judgment or order appealed from."

Supreme Court, U. S.
FILED
NOV 7 1980
MICHAEL RODAK, JR., CLERK

No. 80-556

In the Supreme Court of the United States

OCTOBER TERM, 1980

CENTRAL LIQUOR CO
~~ROBERT Z. NAIFEH~~, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-556

CENTRAL LIQUOR CO.
~~ROBERT Z. NAIFEH,~~ ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

Whether a pretrial order denying a motion to dismiss an indictment is appealable immediately under the "collateral order" exception to the final judgment rule when an individual partner raises a claim of double jeopardy premised on the theory that he is legally indistinguishable from a partnership that is his co-defendant.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A–3 to A–8) is not yet reported. The opinion and order of the district court (Pet. App. A–11 to A–12) are unreported. The prior opinions of the district court and court of appeals (Pet. App. A–15 to A–17 and A–19 to A–20) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1980. The petition for a writ of certiorari was filed on October 7, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In December 1978 a federal grand jury indicted petitioners for price fixing, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Petitioners Central Liquor Company and Jarboe Sales Company are partnerships with annual sales of approximately $20 million. Petitioners Louis Abraham, Jr. and Robert Z. Naifeh are partners in Jarboe Sales and Central Liquor, respectively. Prior to empanelling a jury, Abraham and Naifeh moved to dismiss the charges against them, contending that the Double Jeopardy Clause precludes separate Sherman Act charges against an individual partner and a partnership stemming from the same criminal episode. The district court denied the dismissal motions (Pet. App. A–19 to A–20), the court of appeals refused to entertain petitioners' interlocutory appeals because jeopardy

had not yet attached (*id.* at A-15 to A-17), and this Court denied petitions for certiorari following that ruling (444 U.S. 866 (1979)).

In November 1979, a jury panel was selected and sworn. Naifeh and Abraham then renewed their double jeopardy challenge to the indictment. The district court denied their dismissal motions once again (Pet. App. A-11 to A-12), and a unanimous court of appeals dismissed interlocutory appeals for lack of jurisdiction (*id.* at A-3 to A-8). The court of appeals explained that interlocutory review of a pretrial ruling in a criminal case is authorized by 28 U.S.C. 1291 only if the ruling constitutes a "collateral order" as described in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) (Pet. App. A-5). The court recognized that *Abney* v. *United States*, 431 U.S. 651 (1977), applied the "collateral order" doctrine to permit interlocutory review of a double jeopardy claim raised before commencement of trial on charges that already had been tried. The court of appeals relied, however, on the fact that no question of repetitive trials is involved in the present case, and that petitioners' right to be free from duplicative convictions for the same offense can be fully vindicated by appeal from a final judgment (Pet. App. A-6 to A-7). The court of appeals also concluded that petitioners were not entitled to immediate appellate review of their claim that the charges brought against them improperly exposed them to additional expense and increased trial complexity. The court explained that "expense for attorneys does not create a multiple prosecutions situation" (*id.* at A-8). It also noted that, since the partners and partnerships were charged with offenses resulting

from the same course of conduct, adjudication of those charges in a single proceeding would not materially increase the complexity of the trial (*ibid.*).[1]

ARGUMENT

The decision of the court of appeals, on which we essentially rely, is correct and does not conflict with any decision of this Court or any court of appeals. Further review by this Court, which would cause additional delay of a criminal prosecution that has already been too long delayed, is therefore unwarranted.

1. Petitioners contend (Pet. 7–15) that the decision of the court of appeals denying interlocutory review of their double jeopardy claims conflicts with *Abney* v. *United States*, 431 U.S. 651 (1977). There is no merit to this assertion.

As a general matter, orders denying motions to dismiss indictments may not be appealed before final judgment. *United States* v. *MacDonald*, 435 U.S. 850, 853 (1978); see also *Parr* v. *United States*, 351 U.S. 513, 518–521 (1956); *Cobbledick* v. *United States*, 309 U.S. 323, 324–325 (1940). In *Abney*, however, this Court recognized that a decision rejecting a double jeopardy defense may be appealed on an interlocutory basis when the decision satisfies the requirements of the "collateral order" exception to the final judgment requirement. A threefold showing must be made: first,

---

[1] Although the indictment in this case was returned in 1978 and the jury was selected in 1979, the district court has stayed the case indefinitely pending completion of appellate proceedings concerning petitioners' pretrial double jeopardy claims (Pet. App. A-1 to A-2).

the order must constitute a complete, formal and final rejection of the double jeopardy claim; second, the claim must be collateral to and separable from the issues to be resolved at trial; and third, there must be a danger that the interests protected by the Double Jeopardy Clause would be "significantly undermined" if appellate review were postponed (431 U.S. at 658–661).

Applying this three-part test, the Court held in *Abney* that a pretrial order rejecting a double jeopardy defense to the retrial of an indictment was immediately appealable. The Court emphasized that the outcome of the second trial would have no bearing on the resolution of the double jeopardy claims raised by the defendant, and that the constitutional interests protected by the prohibition against multiple prosecutions of a single offense would be defeated if appellate review were withheld until the second trial was completed (431 U.S. at 661). Significantly for present purposes, however, the Court emphasized that the Double Jeopardy Clause's protection "against being twice convicted for the same crime * * * can be fully vindicated on an appeal following final judgment" (*id.* at 660), and added that the "special considerations * * * which justify a departure from the normal rule of finality * * * do not extend beyond the claim of former jeopardy" (*id.* at 663).

The factors that led the Court to apply the collateral order doctrine in *Abney* are wholly absent in this case. In contrast to the defendant in *Abney*, petitioners have not yet been tried. They are asserting double jeopardy claims to forestall their original trial, not to avoid a repetitive trial. Moreover, unlike the situation

in *Abney*, petitioners' double jeopardy claims are premature and cannot be evaluated prior to the resolution of proceedings in the district court. For example, the jury may acquit all of the defendants, thereby removing the possibility of even a single conviction and punishment. For that matter, if the jury were to convict the partners, but not the partnership, no question of double convictions would arise. And even if all defendants were convicted, the imposition of punishment on the partners alone, or the partnerships alone, would remove any issue of cumulative penalties. Thus, the double jeopardy defense that petitioners seek to litigate on appeal is not wholly collateral to and separate from the resolution of the issues to be determined at trial. "[T]he question at stake in the motion to dismiss necessarily 'remains open, unfinished [and] inconclusive' until the trial court has pronounced judgment." *United States* v. *MacDonald, supra*, 435 U.S. at 859. "Appellate courts would be in no better position than trial courts to vindicate a right that had not yet been shown to have been infringed." *Id.* at 861. And if petitioners are improperly subjected to cumulative penalties following the completion of their trial,[2] "post-conviction appeals would be totally effective in protecting [their] rights" (Pet. App. A-7).

Although petitioners complain that simultaneous prosecutions of partners and partnerships will expose them to additional expense and trial complexity, these

[2] We do not, of course, concede that separate penalties for the partner and the partnership, if both are convicted, would constitute impermissible multiple punishment for a single offense or offender.

simultaneous prosecutions certainly do not force petitioners to "endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense." *Abney* v. *United States*, *supra*, 431 U.S. at 661.[3] Rather than being "forced to 'run the gauntlet' a second time before an appeal could be taken" (*id.* at 662), petitioners are required by the decision of the court of appeals here simply to defend themselves in a single trial and to present their claims on appeal following a final judgment. As the court of appeals explained (Pet. App. A-8): "Any trial is an ordeal, but defendants may not escape a single trial through application of the double jeopardy clause." Moreover, as the court of appeals also pointed out (*ibid.*), the charges in this case stem from a single series of events and joinder of the defendants should not materially affect the complexity of the trial. This is *a fortiori* true if, as petitioners assert, individual partners are indistinguishable from their co-defendant partnerships.[4]

2. Petitioners also rely (Pet. 7) on *United States* v. *Alessi*, 536 F.2d 978, 979-981 (2d Cir. 1976), and

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[3]The value to a defendant of avoiding legal expenses by winning before, rather than after, the completion of trial does not justify interlocutory review, even of constitutional claims. See *United States* v. *MacDonald*, *supra*, 435 U.S. at 860 n.7.

[4]Petitioners' reliance (Pet. 7) on *Crist* v. *Bretz*, 437 U.S. 28 (1978), and *Menna* v. *New York*, 423 U.S. 61 (1975), is without basis. *Crist* held that jeopardy attaches when a jury is sworn. *Menna* held that a plea of guilty to a charge that violates the Double Jeopardy Clause does not prevent the defendant from subsequently raising a double jeopardy challenge to the conviction. Neither case considered the issue of interlocutory appealability decided by the court below.

United States v. *Griffin*, 617 F.2d 1342, 1343–1346 (9th Cir. 1980). While we have serious doubts about the correctness of those decisions, neither conflicts with the decision here. In *Alessi*, an indicted defendant moved to dismiss charges that the government purportedly had agreed to forego pursuant to a plea bargain. The Second Circuit held that the order denying the dismissal motion was immediately appealable under the collateral order doctrine. The court reasoned that the Due Process Clause protects a defendant against trial on charges that the government previously agreed to drop in return for a guilty plea on other charges. That protection would be irretrievably lost, the court reasoned, if interlocutory review were denied. The defendant's interest in avoiding a second prosecution in these circumstances was deemed to be akin to the interest of a defendant seeking to avoid a retrial of charges barred by the Double Jeopardy Clause. In the present case, in contrast to *Alessi*, petitioners have not been convicted on any charges following a guilty plea, and have not received a promise from the prosecutor that they will be free from prosecution on the present charges.

In *United States* v. *Griffin*, *supra*, the Ninth Circuit held that an order denying a motion to dismiss an indictment on grounds of prosecutorial vindictiveness was immediately appealable. The right to avoid trial on charges obtained in retaliation for the exercise of a procedural right would be irretrievably lost, the court reasoned, if the defendant were forced to await the outcome of trial before seeking review. In this case, unlike *Griffin*, no prosecutorial vindictiveness is or could be alleged, and the double jeopardy interests

that petitioners assert can adequately be protected after trial proceedings are concluded.[5]

3. The decision of the court of appeals correctly balances two competing interests under 28 U.S.C. 1291. The rule of "finality" weighs heavily against interlocutory appeals in recognition of the strong public interest in the expeditious completion of criminal trials. That interest is embodied in the Speedy Trial Clause of the Sixth Amendment (*United States* v. *MacDonald*, *supra*, 435 U.S. at 861–862) and the Speedy Trial Act of 1974 (18 U.S.C. 3161). As the Court explained in *MacDonald*, "[t]he rule of finality has particular force in criminal prosecutions because 'encouragement of delay is fatal to the vindication of the criminal law' " (435 U.S. at 853–854). This case illustrates the importance of the doctrine of finality. Following their indictment in 1978, petitioners have

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[5]The other court of appeals decisions relied on by petitioners are entirely irrelevant to the issue presented in this case. *United States* v. *Rumpf*, 576 F.2d 818 (10th Cir.), cert. denied, 439 U.S. 893 (1978), held that a notice of appeal from a pretrial order denying a double jeopardy claim (asserted prior to *Abney* v. *United States*, *supra*) did not divest the district court of jurisdiction to try the charges in the indictment, at least in the absence of any request for a continuance or delay pending resort to the court of appeals. *Moroyoqui* v. *United States*, 570 F.2d 862 (9th Cir. 1977), cert. denied, 435 U.S. 997 (1978), concluded that an appeal from an order denying a double jeopardy claim stripped the trial court of power to proceed with the trial. Neither of these cases considers the question whether a double jeopardy claim of the kind presented in this case is subject to immediate appeal. *Launius* v. *United States*, 575 F.2d 770 (9th Cir. 1978) held only that unauthorized cumulative punishments for the same offense are impermissible under the Double Jeopardy Clause regardless of whether they are imposed simultaneously or sequentially.

taken two appeals to the court of appeals and have sought certiorari in this Court on both occasions. A jury was selected and sworn approximately one year ago, but the trial has not yet commenced because of petitioners' repetitive pretrial appeals.

On the other hand, the collateral order doctrine has a limited role to play in permitting interlocutory appeals from orders that cannot effectively be reviewed following final judgment without a significant impairment of the constitutional right asserted by the defendant. In present circumstances, not only is it possible to review petitioners' double jeopardy claims after final judgment without sacrificing any substantial right, but it also is clear that meaningful analysis of those claims must await the district court's adjudication of petitioners' guilt or innocence and its determination of what sentence (if any) is appropriate in this case. Under these circumstances, the court of appeals correctly declined to depart from the rule of finality.[6]

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[6] Petitioners' discussion of the merits of their double jeopardy theory (Pet. 18-23) has no bearing on the jurisdictional question decided by the court of appeals. In any event, we note that *United States* v. *A & P Trucking Co.*, 358 U.S. 121 (1958), relied on by petitioners, lends no support to their contentions on the merits. The Court's opinion indicates that partners and partnerships may be held separately accountable for criminal violations so long as each defendant is shown to be responsible for committing the elements of the alleged offense (358 U.S. at 126-127). See *Western Laundry & Linen Rental Co.* v. *United States*, 424 F.2d 441 (9th Cir.), cert. denied, 400 U.S. 849 (1970).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 80-556

In the Supreme Court of the United States

OCTOBER TERM, 1980

CENTRAL LIQUOR COMPANY, ET AL.,
Petitioners,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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November, 1980

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1. The Brief for the United States in opposition to this petition for a writ of certiorari argues for a rule without a reason.

The United States seeks to limit *Abney* v. *United States*, 431 U.S. 651 (1977) to the precise facts of Mr. Abney's case. This attempt to read a major decision of the Court "as Baron Parke would read a pleading", *United States* v. *Standard Oil Company*, 384 U.S. 224, 226 (1966), and to glide over the serious conflict among the Courts of Appeals by gossamer-thin distinctions, simply reinforces the obvivous importance of the need for review of this case.

The United States never comes to grips with the crucial issue here: all petitioners have been placed in jeopardy

through the empaneling and swearing of the jury, *Crist* v. *Bretz*, 437 U.S. 28 (1978) and the Court of Appeals was, therefore, clearly in error in dismissing these Double Jeopardy Clause appeals for want of jurisdiction. *See especially, Willhauch* v. *Flanagan*, ____ U.S. ____, 101 S.Ct. 10, 11-12 (1980) (Brennan, Circuit Justice) and *Crist, supra*, 437 U.S., at 38.

2. The government's argument (Br., p.5) that the possibility of acquittal by the jury could moot the double jeopardy questions here presented and, therefore, that these double jeopardy claims are not now ripe for appellate adjudication (*id.*) is no more than a restatement of the government's argument in *Abney*. *See, Abney* v. *United States*, No. 75-6521, O.T. 1976, Brief for the United States, p. 37:

> "A double jeopardy claim is simply one reason why there should be no conviction. If the district court errs in favor of the government, its error can be corrected (if a conviction ensues) by reversal on appeal."

The argument did not prevail in *Abney*, and should not prevail here.

3. The government relies heavily upon *United States* v. *MacDonald*, 435 U.S. 850 (1978). This is odd, for *MacDonald* proves the need for review here. In *MacDonald*, the Court of Appeals for the Fourth Circuit held that "[t]he denial of MacDonald's plea of double jeopardy . . . is a proper subject for interlocutory review. . . ." even though MacDonald had undergone *no* trial whatsoever. *United States* v. *MacDonald*, 511 F.2d 196, 199 (4th Cir. 1976). The Fourth Circuit ultimately placed its decision to dismiss the indictment on deprivation of MacDonald's right

to a speedy trial. This Court reversed the Fourth Circuit on that *Sixth* Amendment issue, 435 U.S., at 859-860, because

> "... *Unlike* the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not, either on its face or according to the decisions of this court, encompass a 'right not to be tried' which must be upheld *prior* to trial if it is to be enjoyed at all." (emphasis added)

Significantly, if the Court had wished to disapprove the Fourth Circuit's holding as to the immediate appealability of the Double Jeopardy Clause issue, it surely had the opportunity. *See especially, MacDonald,* 435 U.S., at 859, n.6. The Court did not do so. Thus, these petitioners' Double Jeopardy Clause claims *would* be adjudicated on the merits if presented to the Court of Appeals for the Fourth Circuit, but have been dismissed for want of jurisdiction because presented to the Court of Appeals for the Tenth Circuit. If *this* is not a conflict between the Circuits, what is?

4. The United States seeks to distinguish *United States* v. *Alessi,* 536 F.2d 978, 979-981 (2d Cir. 1976) and *United States* v. *Griffin,* 617 F.2d 1342, 1343-1346 (9th Cir. 1980), by limiting each to its precise facts (Br., pp.7-8). The attempt rings hollow. The reasoning of both *Alessi* and *Griffin* is, quite simply, that if the defendants were correct in their assertions, putting the defendants to trial on the *charges* contained in the indictment would, itself, violate the Constitution. In direct contrast, the Court of Appeals below expressly noted that petitioners relied upon *precisely* this rationale (Pet.App., p. A-6), 628 Fed. 1264, 1266 (10th Cir. 1980), and proceeded to reject it. *Id.* Again, if *this* is not a conflict between the Circuits, what is?

Indeed, if a defendant in a state court who has never been put to trial before any empaneled jury would have a ripe claim for *injunctive* relief under 42 U.S.C. §1983 the moment the jury is empaneled, as Mr. Justice Brennan strongly intimated in *Willhauch* v. *Flanagan, supra,* it follows, *a fortiori,* that the instant claims of violation of the Double Jeopardy Clause are ripe for adjudication and that the Court of Appeals erred in entering a jurisdictional dismissal. And, in light of the foregoing, it is apparent that the government's assertion that the "decision of the court of appeals [below] . . . does not conflict with any decision of this Court or any court of appeals" (Br. p.3) is an example of the wish being the father of the thought.

5. We take strong exception to the repeated assertions in the government's Brief in Opposition that there has been unwarranted delay on the part of either counsel for petitioners, or petitioners, in this case (Br., pp.3, 8, 9). The motions to dismiss this indictment on double jeopardy grounds were filed immediately after return of the indictment. Rule 12(b)(2), F.R.Crim.P. The merits of the motion were argued at length to the District Court at the first opportunity. The District Court ruled, solely on the authority of a divided panel of the Ninth Circuit in *Western Laundry & Linen Rental Company* v. *United States,* 424 F.2d 441 (9th Cir.) *cert. denied,* 400 U.S. 849 (1970), that the motions to dismiss must be denied, and that the order denying the Double Jeopardy Clause dismissal motions was a final order "for purpose of appeal". The Court expressly inquired whether there was then "anything left undone" (Transcript of Hearing, January 4, 1979, p.86, lns.19-20;

p.87, ln.4). The United States, represented by the Chief of the Regional Office of the Antitrust Division, stood mute. *Id.* Not until the first appeal in these cases, *United States* v. *Abraham,* No. 79-1017 and No. 79-1018 (10th Cir. 1979), *amended* (10th Cir.1979), *cert. denied,* 444 U.S. 866 (1979), did the government inject a jurisdictional issue into these appeals in an attempt to prevent an adjudication on the merits by the Court of Appeals.

Petitioners strongly believed the Court of Appeals' first disposition was untenable. Petitioners argued in their respective petitions for writs of certiorari in this Court that the decision should be vacated and the case remanded *for a prompt decision on the merits of the double jeopardy issue.* The government chose to oppose the granting of certiorari, for reasons best known to the government.

The experienced district judge to whom these cases were assigned on remand correctly held that, under the mandate of the first decision of the Court of Appeals, the double jeopardy question would become "ripe upon the empaneling of the jury in this case." (Pet.App., p.A-13, A-14). We note that the government does not now even suggest the District Court was incorrect on *this* point.

On November 16, 1979, the District Court began the process of attempting to select a jury to try this exceptionally emotional case. The case is emotional because the petitioners are wholesalers of alcoholic beverages. The question of whether *any* sale or consumption of alcoholic beverages should *ever* be allowed under any circumstances is an issue that has long aroused deep and fierce religious and moral passions among the people of the State of Oklahoma. For this reason, the process of jury selection was

extraordinarily laborious. Indeed, the District Court was required to excuse so many veniremen for reasons of religious conviction that *the venire was exhausted* on November 16, again on November 19, and a jury was not finally selected until late in the day on November 20, 1979.

In a meticulous application of the mandate of the Court of Appeals, the District Court then stated at a bench conference:

> "Let me observe for the record, at this time, that the jury has been empaneled in this case."

Petitioners thereupon renewed their double jeopardy dismissal motions. In an exceptionally conscientious effort to maintain a clear record, and, thus, obtain appellate review on the merits of the motions, the District Court then stated:

> "For the record, that is a renewal of the motion that was earlier made and appealed *and is now renewed following the empaneling of the jury in this case and the attaching of jeopardy.* Is that correct?"

The question was answered in the affirmative. This procedure was repeated as to each petitioner. The District Court then stated:

> "Now, for the benefit of the reviewing court, let me observe that the motions which have just been renewed have been *studied exhaustively by the court prior to this time in attempting to comply with the reasoning and the position of the Court of Appeals.*
>
> "I have empaneled this jury and permitted these motions to be renewed, *double jeopardy to you having attached,* and the motions having become *ripe for decision* [under the decision of the Court of Appeals]." (emphasis added)

At that point, notices of appeal were immediately presented and filed in open court (although, under Rule 4(b), F.R.A.P., the notices of appeal need not have been filed for a period of ten days). The District Court ruled that an immediate appeal was now proper, and stated:

> "For the further benefit of the reviewing court, let me also explain that the question of immediate appeal has been exhaustively studied, thoughtfully considered, prior to this time, and the explanation for my decision to permit the immediate appeal and the staying of the proceedings pending the appeal is also contained in the written order. . . ." (*United States* v. *Central Liquor Company, et al.*, Transcript, November 20, 1979, p.90, ln.17 - p.94, ln.4). (emphasis added).

The government moved to dismiss the appeals on jurisdictional grounds and the question was elaborately briefed in the Court of Appeals. The motion was denied by the Court of Appeals on March 4, 1980 (Pet.App., p.A-5, n.2). The government, however, was ultimately successful in obtaining yet another dismissal on jurisdictional grounds (Pet. App., p.A-8). That dismissal is presented for review here. It is the *government* which has brought an indictment that shows on its face it is vitiated by the Double Jeopardy Clause, and it is the government which has fought at each step of the proceedings to prevent adjudication on the merits of the Double Jeopardy claim in the Court of Appeals and in this Court.

Especially in light of the fact that the jury has been sworn, the exceptionally emotional nature of this case, and the consequent importance of the particular persons chosen as jurors, the government's assertion that "petitioners' re-

liance . . . on *Crist* v. *Bretz*, 437 U.S. 28 (1978) . . . is without basis" (Br., p.6, n.4), is astounding. The United States itself, in its Memorandum as Amicus Curiae in *Crist* v. *Bretz*, No. 76-1200, filed July 26, 1977, stated (pp.6-7):

> "In the federal courts jeopardy attaches when the jury is sworn. We do not seek to alter this rule, because *defendants may have important interests in the process of jury selection itself that are deserving of the constitutional double jeopardy protection.*"

We agree.

7. We take even stronger exception to the government's comments regarding "delay" in light of the government's own (successful) contention in *Helstoski* v. *Meanor*, 442 U.S. 500, 506-508 and n.4 (1979), that *if* a defendant believes a district court's denial of a motion to dismiss is "appealable before trial", *Helstoski, supra*, No. 78-546, O.T. 1978, Brief for the United States, p.91, the defendant *must* file a notice of appeal within "the jurisdictional time limit for appellate review" *id.* p.92, n.36, contained in Rule 4(b), F.R.A.P., or be denied *any* interlocutory review whatsoever, regardless of the correctness of the defendant's position as to both immediate appealability and the merits of his constitutional claim.

The assertion that counsel for petitioners should have disregarded a major precedent of this Court, deciding a vital issue of appellate procedure, handed down at the government's own urging, comes with ill grace.

CONCLUSION

The importance of the jurisdictional dismissal entered below is undeniable.

The irreconcilable conflict between (at least) the Fourth and Tenth Circuits on the jurisdictional issue presented here is explicit.

The conflict in principle between the Second, Fourth and Ninth Circuits on the one hand and the Tenth Circuit on the other is compelling.

The imperative need for "clarity . . . in matters of jurisdiction", *Serfass* v. *United States*, 420 U.S. 377, 384 (1975), is self-proving.

The petition for a writ of certiorari should be granted.

Respeectfully submitted,

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November, 1980

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States, hereby certifies that three (3) true and correct copies of the foregoing Reply Brief in Support of Petition for A Writ of Certiorari were mailed, by certified mail, postage fully prepaid, to all parties required to be served, to-wit, the Honorable Wade S. McCree, Jr., Solicitor-General, Office of the Solicitor-General, United States Department of Justice, Washington, D.C. 20530, this _____ day of November, 1980.

Bernard J. Rothbaum, Jr.